



ASIC

Australian Securities & Investments Commission

29 October 2012

Ms Deborah O'Neill MP
Chair
Parliamentary Joint Committee on
Corporations and Financial Services
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Dear Ms O'Neill

INQUIRY INTO THE CORPORATIONS LEGISLATION AMENDMENT (DERIVATIVES TRANSACTIONS) BILL 2012 ("THE BILL")

The Australian Securities and Investments Commission (ASIC) will have significant involvement in the implementation of the measures in the Bill once it is enacted. We have considered the implications of the specific recommendations of the Parliamentary Joint Committee affecting ASIC contained in the report that it issued in October 2012 ("the Report").

We have discussed with Treasury the five recommendations. We thought because of the specific nature of a number of the recommendations for ASIC in the Report that we should indicate to the Committee our responses to the relevant recommendations relating to ASIC. Our response to each recommendation is outlined below.

Transparency – Recommendations 1, 2 and 4

There are three recommendations that relate to the transparency of ASIC's involvement in the development of relevant rules for derivatives markets.

ASIC strives to achieve transparency about the processes it adopts and decisions that it makes. The matters raised in Recommendations 1, 2 and 4 of the Report are matters that we think will assist in delivering the outcome of regulatory transparency and we are therefore proposing to issue guidance generally in line with the Committee's recommendations.

Recommendation 1 – Consultation process for rule development

This recommendation applies both to Treasury and ASIC.

As for ASIC, the special procedural requirements in the Bill as well as the requirements of the *Legislative Instruments Act 2003* will govern the making of derivative transaction rules (DTRs) and derivative trade reporting rules (DTRRs).

In summary those requirements are that in making any DTRs ASIC:

- must have regard to the likely effect of the proposed rule on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system, and the likely regulatory impact of the proposed rule (proposed s901H);
- must consult the public before making rules, and must consult with APRA, the Reserve Bank of Australia and any other prescribed person or body (proposed s901J);
- must obtain the Minister's consent prior to making DTRs (proposed s901K).

There are very limited exceptions for emergency rules that are subject to Ministerial disallowance (proposed s901L). There are similar provisions that apply to the process for writing DTRs (see proposed ss 903F-903J).

ASIC is also required to comply with the obligations on agencies about regulatory impact analysis under the Office of Best Practice Regulation requirements.

Within that framework, we would expect to adopt an approach similar to that used by us when making Market Integrity Rules under s798G of the Corporations Act. Such an approach would involve us having specifically targeted consultation arrangements with relevant stakeholder groups (market participants and infrastructure providers as well as investors/consumers and official stakeholders) alongside public consultation wherever possible.

We note that as a consequence of the obligations described above we will be required to engage in public consultation whenever making a new set of DTRs, subject to the emergency rulemaking power. We accordingly envisage that we will have specific consultation arrangements for each set of derivatives rules that will be made.

This recommendation will therefore be addressed partly by ASIC communicating with stakeholders the specific consultation processes that it proposes to adopt for each discrete set of derivatives rules, as well as the guidance given above.

Recommendation 2 - Regulatory guidance explaining derivatives transactions and trade repository rules

In our response to Recommendation 1 we noted the process that we use for making market integrity rules. We have for market integrity rules adopted the practice of issuing regulatory guidance about the rules that we have made. This is done in the interests of transparency, to help the regulated community understand the obligations they are under. (See for example RG 223, *Guidance on ASIC market integrity rules for competition in exchange markets*).

We consider that the same process involving the issue of regulatory guidance about derivatives rules is an approach that could usefully also be followed for derivatives rules that ASIC may make. We would expect to adopt this approach wherever possible, subject to time constraints around our emergency rule-writing powers.

Recommendation 4 - Regulatory guidance on confidentiality of data and the use of data

ASIC recognises the commercial sensitivities associated with the data that trade repositories are likely to hold when they perform that role. We would fully expect that relevant rules and associated guidance will deal with the protections for the data held by a trade repository, including the use to which such data can be made and confidentiality of that data.

As a supervisor of trade repositories we would also be very focused on overseeing the way in which such entities deal with the information that they hold.

For overseas trade repositories, ASIC would engage closely with regulators in peer jurisdictions to ensure that there is no question of these key issues being compromised.

Consultation- Recommendation 5

Recommendation 5 proposes that ASIC should consult with the Minister for Resources and Energy when ASIC is contemplating making relevant derivatives rules under the powers to be granted under the Bill. ASIC considers that as part of the requirements for procedural fairness and best regulatory practice that we should engage in appropriate consultation with relevant stakeholders when we are making regulatory decisions, such as making rules under ASIC's rule making powers. We already engage in consultation as part of the process of making market integrity rules for financial markets that are regulated under Part 7.2 of the Corporations Act.

ASIC when considering relevant derivatives rules that deal with matters that may affect a relevant stakeholder in the energy market will therefore consult with relevant stakeholders. This may include the Department of Resources and Tourism and other official agencies responsible for electricity, such as the Australian Energy Markets Commission and the Australian Energy Market Operator.

To the extent that the Bill may be amended to impose specific obligations on ASIC to consult or to take into consideration matters raised by other regulators when making decisions about derivative rules on matters relating to energy markets we will ensure that the requirement to consult is included in the process that we adopt for making derivative rules.

ASIC accountability – Recommendation 3

There is already a process in train whereby ASIC, the Reserve Bank of Australia and the Australian Prudential Regulatory Authority are expected to periodically publish OTC derivatives market reports. It is expected that the most recent such report will be published on 30 October or shortly thereafter.

These reports are intended to give all stakeholders a comprehensive oversight of developments in the OTC derivatives market, and further steps that may be needed in the Australian context to ensure compliance with Australia's G20 commitments, in a way appropriate and adapted for the Australian marketplace.

We anticipate that informed by these reports ASIC will be in a position to provide to the Committee details about the development of OTC derivative markets and rules, and the market's response to the new regulatory requirements, as proposed in Recommendation 3 of the Committee's report.

Conclusion

ASIC is committed to transparency in its rulemaking processes and to full engagement with all relevant stakeholders. It will work with the PJC to keep the Parliament informed of developments in a collaborative way.

The measures outlined above that we propose to adopt to implement the recommendations in the Committee's report we think should assist industry understand ASIC's involvement in the OTC derivatives market and help to ensure that in particular ASIC when making derivatives rules undertakes a transparent and accountable process.

Yours sincerely



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